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No. 90-1891

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

LUCYLE KALISH and SOL JOSEPH KAMEN,

Petitioners,

—vs.—

FRANKLIN ADVISERS, INC., FRANKLIN DISTRIBUTORS, INC., FRANKLIN ADMINISTRATIVE SERVICES, INC., FRANKLIN RESOURCES, INC., FRANKLIN CUSTODIAN FUNDS, INC. (U.S. GOVERNMENT SECURITIES SERIES),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

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Brief of Respondents

Question presented for review:

Did the courts below err in denying petitioner a jury trial on an equitable claim under § 36(b) of the Investment Company Act of 1940?

The parties to the proceeding in the United States Court of Appeals for the Second Circuit were:

Lucyle Kalish
Sol Joseph Kamen

Plaintiffs-Appellants

Franklin Advisers, Inc.
Franklin Distributors, Inc.
Franklin Administrative Services, Inc.
Franklin Resources, Inc.
Franklin Custodian Funds, Inc.
(U.S. Government Securities Series)

Defendants-Appellees

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Statement of the Case

Plaintiffs are shareholders of defendant Franklin Custodian Funds, Inc. (U.S. Government Securities Series), a large public mutual fund which invests in Ginnie Mae securities. They filed this action pursuant to Section 36(b) of the Investment Company Act of 1940, claiming that the Fund's adviser, Franklin Advisers, Inc., and its sister companies, had breached a fiduciary duty to the Fund by charging the Fund excessive fees.

Prior to trial, defendants moved to strike plaintiffs' jury demand on the ground that the relief sought was equitable, not legal. The motion was granted by the District Court, Hon. Charles S. Haight, ([1987-88 Transfer Binder] Fed.Sec.L.Rep. (CCH) para. 93,649 (S.D.N.Y. 1988)) and the case was tried as a bench trial. The case was dismissed on the merits (742 F.Supp. 1222 (S.D.N.Y. 1990)), and the dismissal and the ruling striking the jury demand were both affirmed by the Court of Appeals for the Second Circuit (928 F.2d 590 (2d Cir. 1991)).

Summary of the Argument

1. The question presented for review by petitioner is not worthy of review by this Court because the decision of the Court of Appeals for the Second Circuit is not in conflict with the decision of any other federal court of appeals on the point, i.e. the right to trial by jury. Nor did the Court of Appeals for the Second Circuit depart from the accepted and usual course of judicial proceedings in any way.

2. In any and all events, the decision of the District Court denying a jury trial, affirmed by the Court of Appeals, was correct. In a well-reasoned Opinion, issued March 21, 1991, the Court of Appeals for the Second Circuit (Circuit Judges Timbers, Meskill and Cardamone) affirmed the District Court's grant of defendants' motion to strike plaintiffs' demand for a jury trial. The Court of Appeals Opinion

directly addressed and rejected the same argument plaintiffs now make to this Court.

The standard: *Tull* v. *United States*, 481 U.S. 412 (1987)

In perhaps its most comprehensive recent statement in the last several years on the right to jury trial, this Court stated:

> "To determine whether a statutory action is more similar to cases that were tried in courts of law than to suits tried in courts of equity or admiralty, the Court must examine both the nature of the action and of the remedy sought. First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity [citations omitted]. Second, we examine the remedy sought and determine whether it is legal or equitable in nature [citations omitted]."

Tull v. *United States*, 481 U.S. 412, 417-18 (1987). This Court then added an important *caveat*:

> "We reiterate our previously expressed view that characterizing the relief sought is '[m]ore important' than finding a precisely analogous common-law cause of action in determining whether the Seventh Amendment guarantees a jury trial [citation omitted]."

(481 U.S. at 421). This Court in *Tull* upheld the defendant's right to a jury since the remedy sought there (a statutory penalty for money damages) was more analogous to a suit for damages than to one for "disgorgement of improper profits, traditionally considered an equitable remedy" (481 U.S. at 424). Here, of course, quite the reverse is true.

Point I—

There is no right to a jury trial for a claim under § 36(b) of the Investment Company Act of 1940

The Second Circuit, from which certiorari is sought in the instant case, had already passed upon this precise issue and held that there is no right to a jury trial in a Section 36(b) claim. *Krinsk* v. *Fund Asset Management, Inc.*, 875 F.2d 404, 414 (2d Cir.), *cert. denied*, ____ U.S. ____, 110 S.Ct. 281 (1989), *aff'g*, 654 F.Supp. 1227 (S.D.N.Y. 1987); *Schuyt* v. *Rowe Price Reserve Fund, Inc.*, 835 F.2d 45, 46 (2d Cir. 1987), *cert. denied*, 485 U.S. 1034 (1988); *In re Gartenberg*, 636 F.2d 16, 18 (2d Cir. 1980), cert. denied, 451 U.S. 910 (1981).

Every other court which has passed upon the issue of whether a claim under Section 36(b) of the Investment Company Act is triable to a jury has also concluded that such a claim is equitable in nature, affording the plaintiff no right to a jury trial. *Kamen* v. *Kemper Financial Services, Inc.*, 908 F.2d 1338, 1350-51 (7th Cir.), cert. denied on this point, 500 U.S. ____, 111 S.Ct. 554 (1990); *In re Evangelist*, 760 F.2d 27, 29-30 (1st Cir. 1985); *Kalish* v. *Franklin Advisers, Inc.*, [1987-88 Transfer Binder] Fed.Sec.L.Rep. (CCH) para. 93,649 at 97,983-84 (S.D.N.Y. 1988); *Krinsk* v. *Fund Asset Management, Inc.*, 654 F.Supp. 1227, 1235-36 (S.D.N.Y. 1987); *Weissman* v. *Alliance Capital Management Corp.*, [1985-86 Transfer Binder] Fed.Sec.L.Rep. (CCH) para. 92,396 at 92,439-40 (S.D.N.Y. 1985), mandamus denied, 788 F.2d 5 (2d Cir. 1986); *Tarlov* v. *Paine Webber Cashfund, Inc.*, 559 F.Supp. 429, 441 (D.Conn. 1983); *Jerozal* v. *Cash Reserve Management, Inc.*, [1982-83 Transfer Binder] Fed.Sec.L.Rep. (CCH) para. 99,019 at 94,827 (S.D.N.Y. 1982); *Markowitz* v. *Brody*, 90 F.R.D. 542, 547-48 (S.D.N.Y. 1981); *Gartenberg* v. *Merrill Lynch Asset Management, Inc.*, 487 F.Supp. 999, 1006-08 (S.D.N.Y.), mandamus denied, 636 F.2d 16 (2d Cir. 1980).

The reasoning in these cases, and, in particular, in the Second Circuit's Opinions in *Krinsk, Schuyt* and *In re Gartenberg*, was clear and unassailable. There is no reason or justification for this Court to review this question.

Plaintiffs' self-styling of their remedy as "damages", of course, does not make their Section 36(b) claim a "bona fide claim for damages" within the meaning of *Krinsk, Schuyt* and *In re Gartenberg*. As the late Chief Judge Friendly explained in *Securities & Exchange Commission* v. *Commonwealth Chemical Securities, Inc.*, 574 F.2d 90, 95 (2d Cir. 1978):

> ". . . [N]ot all money claims are triable to a jury. A historic equitable remedy was the grant of restitution 'by which defendant is made to disgorge ill-gotten gains or to restore the status quo, or to accomplish both objectives' [citations omitted]. And '[w]hen restitution is sought in the form and in the situations allowed in equity prior to the rules or authorized by valid statutes there is no right to jury trial' [citation omitted]. Disgorgement of profits in an action brought by the SEC[1] to enjoin violations of the securities laws appears to fit this description; the court is not awarding damages to which plaintiff is legally entitled but is exercising the chancellor's discretion to prevent unjust enrichment."

Accord: *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469, 477-78 (1962) ("the constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings"); *Arber* v. *Essex Wire Co.*, 490 F.2d 414, 423 (6th

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1 As the late Judge Weinfeld noted with regard to *Commonwealth Chemical Securities, Inc.*, "[t]he fact that the action in that case was an SEC enforcement action was considered by the Court of Appeals but was not a factor essential to its holding which turned simply on recognizing the relief sought as restitutionary in nature and on the finding that restitution was an equitable remedy." *Maldonado* v. *Flynn*, 477 F.Supp. 1007, 1011 n.14 (S.D.N.Y. 1979), mandamus denied and decision adhered to, 671 F.2d 729, 732 (2d Cir. 1982). Accord: *Gartenberg, supra* (487 F.Supp. at 1007).

Cir.), cert. denied, 419 U.S. 830 (1974) (denying jury trial in 10b-5 action where relief requested by plaintiff, though denominated damages, was the "monetary equivalent of rescission").

In short, irrespective of how plaintiffs seek to describe their claim, it is an equitable claim which is triable to the Court, not to a jury.

Plaintiffs nonetheless assert that this case warrants review on the ground that a different result should now be reached due to this Court's recent decision in *Chauffeurs, Teamsters and Helpers Local No. 391* v. *Terry*, 494 U.S. 558 (1990). That is not the case.

Terry, which was not a Section 36(b) action, but rather a labor law case, should not cause this Court to review the question of whether a right to a jury trial exists in a Section 36(b) claim. All that *Terry* stands for on the issue of the right to a jury trial is the proposition that, in determining the right to a jury trial, a court should examine both the nature of the issues involved and the remedy sought, the latter being the more important of the two factors. Since the remedy sought in a Section 36(b) action is a return to the Fund of alleged excessive fees earned by the Fund advisers—essentially an action for restitution, which is an equitable remedy, application of *Terry* to a 36(b) claim has led and should lead here to the conclusion that plaintiffs have no right to a jury trial.

A federal court applying *Terry* to this precise issue has reached the same conclusion. In *Kamen* v. *Kemper Financial Services, Inc.*, 908 F.2d 1338 (7th Cir.), cert. denied on this point, 111 S.Ct. 554 (1990), the Court of Appeals for the Seventh Circuit affirmed the striking of a jury demand in a Section 36(b) action, holding (at p. 1351 of 908 F.2d):

> ". . . the combination of a fiduciary duty with a restitutionary remedy in § 36(b) continues to put this statute on the equitable side of the constitutional line."

Similarly, in this case, the teaching of *Terry* was correctly applied by the Court of Appeals for the Second Circuit. The

Court of Appeals *did* look to the remedy sought and correctly concluded that what was truly sought here was restitution, regardless of whether plaintiffs chose to call their remedy "damages". Plaintiffs' self-styling of their remedy as "damages", of course, does not, and did not here, make their Section 36(b) claim a "bona fide claim for damages".

The purported distinction which plaintiffs here argue (i.e. that they asked for money damages for excessive advisory fees in their Complaint instead of restitution), was also expressly argued to and rejected by the First Circuit in *In re Evangelist* in which the Court held:

> "[T]he right to a jury trial cannot turn on the simple substitution of a different word [citations omitted]. Otherwise, any equitable action for money, say for restitution, could become a legal action by the use of the word 'damages' in place of 'restitution.' "

(760 F.2d at 31).

Plaintiffs acknowledge that the relief they sought in this action was the return of allegedly excessive advisory fees, although they label such recovery as "damages". The cases which have dealt with this question have recognized that this remedy is, in truth, the remedy of restitution, which is an equitable remedy, not a legal remedy. See, e.g. *In re Evangelist*, *supra* (760 F.2d at 29-30):

> "[T]he remedy Congress created—the payment of any excess fee to the company—is similar to the traditional equitable remedy of an 'accounting' [citations omitted]. Like other remedies of restitution, that remedy requires one owing a fiduciary duty . . . to 'disgorge' . . . money taken in derogation of the duty."

Accord: *In re Gartenberg*, *supra* (636 F.2d at 18).

The balance of the petition is nothing more than a diatribe on the results of this and other Section 36(b) actions. Plaintiffs suggest that these complex actions have not prospered as well in the hands of judges as they might have before lay

juries. Thus, they reason, in order for there to be a curtailment of "excessive fees" by fund advisers, this Court should adopt a legal analysis which supports a right to a jury trial in these actions. This proposition is based on nothing more than plaintiffs' personal predilictions and does not warrant review by this Court.

Conclusion

The petition for writ of certiorari should be denied.

Dated: New York, New York
July 9, 1991

Respectfully submitted,

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